ATTORNEY FOR APPELLANT:

GREGORY BOWES
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

STEPHEN R. CARTER
Attorney General of Indiana
Indianapolis, Indiana

MICHAEL GENE WORDEN
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

CLARENCE LUCAS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A05-0509-CR-518
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Sheila Carlisle, Judge
Cause No. 49G03-0502-FA-027781

SEPTEMBER 27,2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

HOFFMAN, Senior Judge

Defendant-Appellant Clarence Lucas appeals his convictions of burglary as a Class A felony and criminal confinement as a Class B felony. We affirm.

The sole issue for review is whether there is sufficient evidence to support Lucas' convictions.[1]

At approximately 1:00 a.m. on February 19, 2005, Teria Anderson was taking a bath in her apartment when she heard a loud "boom." Transcript p. 25. Anderson got out of the bathtub and walked into the living room, where she noticed that the front door to her apartment had been kicked in and knocked off of its hinges. Anderson, who did not see anyone in the apartment, called 911 to report the incident. When she hung up the phone and turned back around, twenty-three-year-old Lucas and Marvin Stowe walked into the apartment and told Anderson to "get on the ground." Transcript p. 26. The men also demanded money and "stuff." Transcript p. 26. Lucas poked Anderson with a long piece of wood that had broken off of the doorframe, and Stowe hit her in the head with a gun. After Anderson refused to give the men money or anything else, Stowe left the apartment because he was fearful that the police were on their way. Although Lucas remained in the apartment, Anderson was able to call 911 again and reach a knife in the

[1]Lucas also argues that the trial court improperly instructed the jury and that there was an improper variance between the charging information and the facts presented at trial. The State correctly points out, however, that these issues are waived because Lucas failed to object to the instructions and alleged variance at trial. *See Szpunar v. State*, 783 N.E.2d 1213, 1218 (Ind. Ct. App. 2003) (stating that failure to object to an instruction at trial results in waiver of the issue on appeal); *Stainbrook v. Low*, 842 N.E.2d 386, 396 (Ind. Ct. App. 2006), *trans. denied*, (stating that failure to raise an issue at trial results in waiver of the issue on appeal).

Further, Lucas' contentions that the instructional errors and alleged material variance constitute fundamental error are also waived. Lucas did not invoke the fundamental error doctrine in his appellate brief. Rather, Lucas raised the fundamental error argument for the first time in his appellate reply brief in response to the State's claims that he waived his challenges to the instructions and alleged variance. A party cannot raise an issue for he first time on appeal in his reply brief. *Friedel v. State*, 714 N.E.2d 1231, 1234 (Ind. Ct. App. 1999). Lucas has waived these issues.

kitchen. During a struggle for the knife, Anderson was injured. Indianapolis Police Department Officer Marshall Berkebile was dispatched to the scene following Anderson's initial 911 call and apprehended Lucas just outside of Anderson's apartment. A jury subsequently convicted Lucas of Class A felony burglary and Class B felony criminal confinement. Lucas appeals.

Lucas argues that there is insufficient evidence to support his convictions. As charged, the State was required to prove that 1) Lucas broke and entered Anderson's dwelling while armed with a deadly weapon, that is: a handgun, and 2) Lucas dragged Anderson from room to room in her residence while armed with a deadly weapon, that is: a handgun. Lucas' sole contention is that the State failed to prove the felony class enhancement element of a deadly weapon. According to Lucas, the State failed to prove that his accomplice, Stowe, was armed with a handgun. In support of his contention, Lucas directs us to Anderson's cross-examination testimony that the gun she saw in Stowe's hand could have been a BB gun or an air gun, rather than a handgun.

This court addressed a similar issue in *B.K.C. v. State*, 781 N.E.2d 1157 (Ind. Ct. App. 2003), where B.K.C., like Lucas, argued that there was insufficient evidence that he was armed with a handgun during the commission of an offense that would be robbery if committed by an adult as alleged in the delinquency petition. In support of his claim, B.K.C. pointed to testimony that the gun he used could have been a BB gun. This court noted, however, that the evidence did not conclusively show that the gun was a BB gun. *Id.* at 1164. Rather, although one witness testified that it was a BB gun, the victim testified that weapon she saw looked "kind of, sort a" like a real gun. *Id.*

This court concluded that, based upon this testimony, B.K.C.'s contention that the weapon used was a BB gun and not a handgun was merely an invitation for us to reweigh the evidence and reassess the credibility of the witnesses, which we will not do. *Id.* We further concluded that the evidence was sufficient to sustain B.K.C.'s adjudication as a delinquent. *Id*.

Here, the victim testified that she saw a gun. Under cross-examination, she testified that although it looked like a handgun, it could have been a BB gun or an air gun. As in *B.K.C.*, Lucas' contention is merely an attempt for us to reweigh the evidence and reassess the credibility of witnesses, which we will not do. There is sufficient evidence to establish that Lucas committed the offenses while armed with a handgun.

Lucas also argues that Anderson's testimony about the handgun was incredibly dubious. Under the incredible dubiosity rule, a court will impinge on the jury's responsibility to judge the credibility of witnesses only when it has confronted inherently improbable testimony or coerced, equivocal, wholly uncorroborated testimony of "incredible dubiosity." *Herron v. State*, 808 N.E.2d 172, 176 (Ind. Ct. App. 2004), *trans. denied,* (citing *Stephenson v. State*, 742 N.E.2d 463, 497 (Ind. 2001), *cert. denied*, 534 U.S. 1105, 122 S.Ct. 905, 151 L.Ed.2d 874 (2002). When a sole witness presents inherently improbable testimony and there is a complete lack of circumstantial evidence, a defendant's conviction may be reversed. 808 N.E.2d at 176. Application of this rule is rare, and the standard to be applied is whether the testimony is so incredibly dubious or inherently improbable that no reasonable person could believe it. *Id.* Here, however, Anderson's testimony is not inherently improbable, coerced, equivocal or wholly

uncorroborated testimony of incredible dubiosity. Further, there is not a complete lack of circumstantial evidence. Based upon the facts of this case, the incredible dubiosity rule simply does not apply.

Lastly, Lucas claims that there is insufficient evidence to support his conviction because the State did not exclude every reasonable hypothesis of innocence. However, the Indiana Supreme Court has explained that this standard is not applicable to appellate review for sufficiency of the evidence. *Ogle v. State*, 698 N.E.2d 1146, 1149 (Ind. 1998).

There is sufficient evidence to support 1) the jury's finding that a handgun was used in the commission of the burglary and the criminal confinement as well as 2) Lucas' convictions for these offenses.

Affirmed.

NAJAM, J., and BAKER, J., concur.